

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0195

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CURRY JAMES NORQUAY,

Defendant and Appellant.

ANDERS BRIEF

On Appeal from the Montana Seventeenth Judicial District Court,
Blaine County, The Honorable John C. McKeon, Presiding

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STATEMENT OF THE ISSUE

Whether the undersigned counsel should be permitted to withdraw from Defendant-Appellant's appeal in accord with the criteria established by the United States Supreme Court in *Anders v. California*, 386 U.S. 738 (1967).

STATEMENT OF THE CASE AND FACTS

An Information charging Curry James Norquay with Burglary, Theft and Possession of Dangerous Drugs was filed on July 7, 2003, for events committed on June 22, 2003, in Blaine County. (D.C. Docs. 1, 3.)

Pursuant to a plea agreement, Norquay pled guilty to Burglary and Theft. On March 22, 2004, Norquay was sentenced for each offense to the Department of Corrections (DOC) for ten years with seven years suspended, to run concurrent. (D.C. Docs. 38, 44.)

While incarcerated in Shelby, Norquay was charged with Riot (a Felony), out of Toole County. (D.C. Doc. 52.) Norquay pled guilty to this charge and received a five year suspended sentence to DOC. (D.C. Doc. 52.)

Norquay was released on November 24, 2006. (D.C. Doc. 44 at Report of Violation.)

On September 7, 2007, Norquay was arrested in Cascade County for Aggravated Burglary (a Felony), Kidnapping (a Felony), and Assault (a Misdemeanor). (D.C. Doc. 44 at Report of Violation.) On September 30, 2008,

Norquay was found guilty by a jury of Aggravated Burglary (a Felony) and Unlawful Restraint (a Misdemeanor).

On November 20, 2008, a Petition for Revocation of Suspended Sentences was filed by the Blaine County Attorney. (D.C. Doc. 44.) The Petition to Revoke stated Norquay violated his March 22, 2004, Judgment Condition #2 (“The Defendant shall obey all city, county, federal, state, and tribal laws and ordinances, and shall generally conduct himself as a good citizen.”) and Montana State condition #8: Laws and Conduct (“I shall comply with all city, county, state, federal laws, ordinances, and conduct myself as a good citizen. I shall report any arrests or contacts with law enforcement to my Probation/Parole Officer within 72 hours. I will at all times be cooperative and truthful in all my communications and dealings with my Probation/Parole Officer.”). (D.C. Doc. 44.)

The facts to support the violation were Norquay’s September 7, 2007, arrest for Aggravated Burglary, Kidnapping, and Assault; the jury’s September 30, 2008, finding of guilt of Aggravated Burglary and Unlawful Restraint; and Norquay’s November 20, 2008, sentence to Montana State Prison (MSP) for twenty-five years with ineligibility for the first ten years of the sentence.¹ (D.C. Doc. 44.)

¹ Norquay’s Cascade County conviction is currently on appeal to the Montana Supreme Court, DA 08-0634.

At the December 9, 2008, Answer Hearing on the Petition to Revoke, Norquay denied the violation. (D.C. Doc. 50, Minute Entry.) The State presented evidence of a certified copy of the Cascade County district court judgment against Norquay. (D.C. Doc. 49.) The Blaine County District Court found the State met its burden of proof by a preponderance of the evidence. (D.C. Doc. 50.) Norquay requested and was granted a continuance to prepare for the dispositional hearing. (D.C. Doc. 50.)

On December 17, 2008, Norquay again requested a continuance. The State produced additional evidence supporting Norquay's violation of his Blaine County suspended sentences. The State produced a February 2, 2007, Toole County Judgment for the Riot conviction which sentenced Norquay to the Department of Corrections for five years, suspended. (D.C. Docs. 52, 53.) The Toole County Judgment ran consecutive with the Blaine County causes. (D.C. Docs. 52, 53.)

The dispositional hearing was held on January 26, 2009. (D.C. Doc. 58; 1/26/09 Tr.) Norquay raised the following issues for resolution with the district court: credit for street time, credit for incarceration relating to the Petition to Revoke, and whether a previous suspended sentence to the DOC could be amended to MSP upon revocation. (D.C. Doc. 58; 1/26/09 Tr. at 6-10.)

The district court determined it had authority to sentence Norquay to MSP upon revocation of a suspended commitment to DOC so long as the period of

incarceration did not exceed the original sentence pursuant to Mont. Code Ann.

§ 46-18-203(7)(a)(iii). (D.C. Doc. 58 at 2.)

The Blaine County district court revoked the suspended portions of Norquay's sentences from the Burglary and Theft offenses and sentenced Norquay to serve out the suspended portion of each sentence (seven years) at MSP. The sentences run concurrently to each other. (D.C. Doc. 58 at 2-3.) The district court gave credit for incarceration from October 16, 2008 to November 20, 2008, which was directly related to jail time for the revocation proceedings. (D.C. Doc. 58 at 3.) The district court stated Norquay was being sentenced, upon revocation, to MSP due to the

serious nature of the violation of terms and conditions and the serious nature of underlying offenses. Much of the reasoning set forth in the initial sentence of the [c]ourt continues to apply, namely that [Norquay] has a record as a juvenile offender involving several offenses, the burglary offense occurred soon after [Norquay's] release from Pine Hills, [Norquay] has a chemical dependency problem that is severe and needs intensive treatment and defendant has a history of violation of the law, chemical abuse and disrespect for authorities. [Norquay] has a considerable need for self improvement and must be closely monitored to insure the public is protected. [Norquay's] criminal behavior since the original sentence has escalated to the extent he is now convicted of violent offense of aggravated burglary and riot.

(D.C. Doc. 58 at 3. *See also*, 1/26/09 Tr. at 21.) The district court did not give any credit for street time. (D.C. Doc. 58 at 4.) The judgment was filed on February 4, 2009. (D.C. Doc. 58.) Norquay appealed.

STANDARD OF REVIEW

Whether a district court has acted within its statutory authority in revoking a suspended sentence presents a question of law over which this Court exercises plenary review. *State v. LeDeau*, 2009 MT 276, ¶ 11, 352 Mont. 140, 215 P.3d 672. When a district court's decision under this standard, the Court inquires whether its conclusions of law are correct. *LeDeau*, ¶ 11.

A district court's decision to revoke a deferred or suspended sentence is reviewed for an abuse of discretion. *State v. Striplin*, 2009 MT 76, ¶ 15, 349 Mont. 466, 204 P.3d 687. A single violation of the terms and conditions of a suspended sentence is sufficient to support a district court's decision to revoke such a sentence. *Striplin*, ¶ 15.

ARGUMENT

I. UNDERSIGNED COUNSEL SHOULD BE PERMITTED TO WITHDRAW FROM DEFENDANT-APPELLANT'S APPEAL IN ACCORD WITH *ANDERS v. CALIFORNIA*.

In *Anders*, the United States Supreme Court concluded that when counsel on appeal finds the case to be wholly frivolous after a conscientious examination, counsel should advise the court and move to withdraw. *Anders*, 386 U.S. at 744. The request to withdraw must be "accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. This brief addresses those potential matters.

However, in making such a presentation, appellate defenders have an inherent dilemma between their duty to advocate for their indigent client, and the obligation of their oath and the rules of procedure and ethics that prohibit them from making non-meritorious claims. The United States Supreme Court addressed this dilemma as follows:

We interpret the discussion rule [of *Anders*] to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with 'notice' that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit.

McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429, 440 (1988).

Thus, the appellate defender must walk that fine line between advocacy and diligence wherein thorough research is the undoing of her client's appeal. Here, the undersigned is compelled by her duty of candor before the Court in accord with *Anders* to provide this Court with notice that diligent research has yielded just such a result. No non-frivolous issues are present in this appeal.

**II. THE RECORD MIGHT ARGUABLY SUPPORT APPELLANT'S
ASSERTION HE RECEIVED A MORE ONEROUS COMMITMENT
UPON REVOCATION OF HIS BLAINE COUNTY SUSPENDED
SENTENCES.**

Montana Code Annotated § 61-8-402(1) provides that if the judge finds an offender has violated the terms and conditions of the suspended or deferred sentence, the judge may “revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence.” Mont. Code Ann. § 46-18-203(7)(a)(iii) (2003).

CONCLUSION

Norquay's appeal of his revoked Blaine County suspended sentences is frivolous and this Court should grant the undersigned's motion to withdraw as counsel on direct appeal and dismiss the appeal.

Respectfully submitted this ____ day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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